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8 **UNITED STATES DISTRICT COURT**

9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 IMDB.COM, INC., a Delaware
12 corporation,

13 Plaintiff,

14 v.

15 XAVIER BECERRA, in his official
16 capacity as Attorney General of the
17 State of California,

18 Defendant.

19 No. 3:16-cv-06535-VC

20
21 **BRIEF OF SCREEN ACTORS
GUILD-AMERICAN FEDERATION
OF TELEVISION AND RADIO
ARTISTS AND ASSOCIATION OF
TALENT AGENTS AS *AMICI
CURIAE* IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

22 Date: February 16, 2017

23 Time: 10:00 a.m.

24 Location: San Francisco Courthouse
Courtroom 4, 17th Floor
450 Golden Gate Ave.

25 San Francisco, CA 94102
Judge: Hon. Vince Chhabria

1 **TABLE OF CONTENTS**

3	TABLE OF AUTHORITIES.....	ii
4	I. INTEREST OF THE AMICI	1
5	II. AGE DISCRIMINATION IN THE ENTERTAINMENT INDUSTRY	
6	IS A SIGNIFICANT PROBLEM.	2
7	III. AB 1687 IS CONSTITUTIONAL.....	4
8	IV. AB 1687 IS NOT PREEMPTED BY 47 U.S.C. § 230.....	9
9	V. CONCLUSION	10

1 **TABLE OF AUTHORITIES**

2 Cases

3 <i>Airbnb Inc. v. City and County of San Francisco</i> , 2016 WL 6599821 (N.D.	
4 Cal., Nov. 8, 2016)	6, 7
5 <i>Bamboo Bros. v. Carpenter</i> , 133 Cal.App.3d 116 (1982).....	8
6 <i>Barrick Realty, Inc. v. City of Gary</i> , 491 F.2d 161 (7th Cir. 1974).....	5
7 <i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	5
8 <i>Fair Housing Council of San Fernando Valley v. Roommates.com, LLC</i> , 521	
9 F.3d 1157 (9th Cir. 2008).....	9
10 <i>Florida Businessmen for Free Enterprise v. City of Hollywood</i> , 673 F.2d 1213	
11 (11th Cir. 1982)	7
12 <i>Goldin v. Public Utilities Commission</i> , 23 Cal.3d 638 (1979).....	7
13 <i>Huong Hoang v. IMDb.com, Inc.</i> , 599 Fed.Appx. 674 (9th Cir. 2015)	9
14 <i>Murphy v. Matheson</i> , 742 F.2d 564, 568 (10th Cir. 1984).....	7
15 <i>Perkins v. LinkedIn Corp.</i> , 53 F.Supp.3d 1222 (N.D. Cal. 2014)	9
16 <i>Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations</i> , 413	
17 U.S. 376 (1973)	passim
18 <i>Ragin v. New York Times Co.</i> , 923 F.2d 995 (2d Cir. 1991).....	6
19 <i>Town Tobacconist v. Kimmelman</i> , 453 A.2d 209 (N.J. Super. 1982).....	8
20 <i>Village of Hoffman Estates v. Flipside</i> , 455 U.S. 489 (1982)	7

21

22 Statutes

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24 California Civil Code § 1798.83.5.....	1

25

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1 Screen Actors Guild-American Federation of Television and Radio Artists
 2 (“SAG-AFTRA”) and the Association of Talent Agents (“ATA”) hereby submit
 3 their *Amicus Curiae* brief in opposition to Plaintiff’s motion for a preliminary
 4 injunction.

5 **I. INTEREST OF THE AMICI**

6 SAG-AFTRA is one of the largest unions in the entertainment industry,
 7 representing over 160,000 media professionals including actors, announcers,
 8 journalists, television and radio personalities, recording artists, singers, stunt
 9 performers and others. SAG-AFTRA’s mission is to organize all work done under
 10 its jurisdiction – including the negotiation of best wages, working conditions, and
 11 health and pension benefits; the preservation and expansion of its members’ work
 12 opportunities; the vigorous enforcement of entertainment industry contracts; and the
 13 protection of its members against unauthorized use of their work. SAG-AFTRA
 14 enforces and espouses a vigorous policy and position against any form of invidious
 15 employment discrimination in the entertainment industry, and strives constantly to
 16 protect its members against all forms of employment discrimination.

17 SAG-AFTRA was the sponsor of Assembly Bill 1687 (“AB 1687”), now
 18 codified at Civil Code § 1798.83.5. SAG-AFTRA is in a unique position to defend
 19 the constitutionality of the statute. SAG-AFTRA receives discrimination complaints
 20 and grievances from its members and gathers information on age discrimination in
 21 the entertainment industry. SAG-AFTRA’s sponsorship of AB 1687 arose from this
 22 institutional knowledge of common entertainment industry practices.

23 ATA is a Los Angeles-based nonprofit trade association comprised of over
 24 100 licensed talent agencies in California. ATA’s membership includes agencies of
 25 all sizes that represent the vast majority of working artists – including actors,
 26 directors, writers, and other artists in film, stage, television, radio, commercial,
 27 modeling, literary work, and other entertainment enterprises. Founded in 1937, the
 28 ATA proudly joins SAG-AFTRA in strongly supporting the California Attorney

1 General's opposition to Plaintiff's pending motion for preliminary injunction.
 2 Despite existing federal and state laws prohibiting age discrimination in
 3 employment, such discrimination continues to exist; it is facilitated through the
 4 public distribution of birthdates and age information via commercial online
 5 employment service providers. ATA believes that AB 1687 materially furthers the
 6 goal of eliminating age discrimination and, in so doing, corrects an injustice that can
 7 lead to the loss of employment for its agency members' artist clients.

8 **II. AGE DISCRIMINATION IN THE ENTERTAINMENT**
 9 **INDUSTRY IS A SIGNIFICANT PROBLEM.**

10 AB 1687 addresses a rampant, pressing problem – the massive amount of age
 11 discrimination in hiring in the entertainment industry. While such age
 12 discrimination is illegal under state and federal anti-discrimination laws, it continues
 13 unabated.

14 Some actors have publicized this unfair treatment. For instance, when award-
 15 winning actress Maggie Gyllenhaal was turned down at age 37 for the part of the
 16 love interest of a 55-year-old actor, she spoke out. *Hollywood Ageism: Where*
 17 *Thirty Is the New Fifty*, World Woman News (Sep. 9, 2016) at
 18 [http://www.worldwomanfoundation.com/hollywood-ageism-where-thirty-is-the-](http://www.worldwomanfoundation.com/hollywood-ageism-where-thirty-is-the-new-fifty/)
 19 [new-fifty/](http://www.worldwomanfoundation.com/hollywood-ageism-where-thirty-is-the-new-fifty/) (viewed Jan. 23, 2017) (“Although the actors grow . . . older, their leading
 20 ladies seem to be getting younger in age. This is especially evident with actors such
 21 as Harrison Ford, who is nineteen years older than fellow actress Virginia Madsen in
 22 the film Firewall. Similar age gaps exist in the careers of George Clooney, Denzel
 23 Washington, and Johnny Depp. Thus, leaving less opportunity for actresses of a
 24 similar age.”).

25 Only 25.7 percent of female characters in film, television, and streaming
 26 video production are over 40 years old, as compared to 74.3 percent of male
 27 characters. Stacy L. Smith, et al., Inclusion or Invisibility? Comprehensive
 28 Annenberg Report on Diversity in Entertainment at 2 (Feb. 22, 2016) (at

1 http://annenberg.usc.edu/pages/~/media/MDSCI/CARDReport FINAL 22216.ashx)
 2 (viewed Jan. 26, 2017).

3 While age discrimination that victimizes major actresses may grab the
 4 headlines, the problem goes far beyond top-billed stars. For instance,
 5 “[n]otwithstanding settlement of an age discrimination lawsuit in 2012, ... the
 6 employment rate of industry writers still declines sharply with age”. Kathleen
 7 Antonia, *Bias and the Business of Show – Employment Discrimination in the*
 8 *“Entertainment” Industry*, Cultural Weekly (Jan. 4, 2017) (at
 9 <http://www.culturalweekly.com/bias-and-the-business-of-show-employment-discrimination-in-the-entertainment-industry/>) (viewed Jan. 23, 2017) (citing
 10 Darnell M. Hunt, *The 2014 Hollywood Writers Report: Turning Missed*
 11 *Opportunities Into Realized Ones*, at 28 (Writers Guild of America 2014)).

12 Age discrimination is also a significant problem in the hiring of film crews.
 13 “Young aspiring adults are more likely to be hired for a place in the film crew than
 14 those with years of experience. Directors nowadays want a fresh outlook on the lens,
 15 but not Peter Mark Richman. Richman was upset that younger people with in the
 16 media industry was favored over the older ones more qualified for a job....” *Ageism*
 17 in *Entertainment Media*, News Activist (Nov. 25, 2016) (at
 18 <http://newsactivist.com/en/articles/media-ethics-section-03002-fall-2015/ageism-entertainment-media>) (viewed Jan. 23, 2017) (citing Bootie Cosgrove-Mather,
 19 *Fighting Ageism In Hollywood*, CBS News (Aug. 1, 2002).

20 The entertainment industry is replete with age discrimination. The special,
 21 intractable nature of this problem was brought to the attention of the California
 22 Legislature, resulting in the enactment of AB 1687. In seeking to deprive those who
 23 make employment decisions in the industry of the opportunity to engage in
 24 prohibited age discrimination, AB 1687 uses a statutory approach that has been
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 26
 27
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1 repeatedly upheld in the anti-discrimination context as well as in other contexts.¹

2 **III. AB 1687 IS CONSTITUTIONAL.**

3 AB 1687 is the latest in a long line of anti-discrimination laws which
 4 recognize that barring discriminatory conduct is insufficient by itself to prevent
 5 discrimination. It is often necessary to regulate solicitations that facilitate
 6 discriminatory conduct in order to effectively combat discrimination. Such laws are
 7 fully constitutional under the longstanding principle that speech which directly
 8 facilitates illegal transactions or conduct is unprotected by the First Amendment.

9 The leading case is *Pittsburgh Press Co. v. Pittsburgh Commission on Human*
 10 *Relations*, 413 U.S. 376 (1973). In *Pittsburgh Press*, the city's Human Relations
 11 Commission barred the newspaper from publishing separate male and female want
 12 ads. The U.S. Supreme Court upheld the Commission's order. "Discrimination in
 13 employment is not only commercial activity, it is illegal commercial activity under
 14 the Ordinance." *Id.* at 388.

15 The Commission and the courts below concluded that the
 16 practice of placing want ads for nonexempt employment in sex-
 17 designated columns did indeed 'aid' employers to indicate illegal sex
 18 preferences. The advertisements, as embroidered by their placement,
 19 signaled that the advertisers were likely to show an illegal sex
 20 preference in their hiring decisions. Any First Amendment interest
 21 which might be served by advertising an ordinary commercial proposal
 22 and which might arguably outweigh the governmental interest
 23 supporting the regulation is altogether absent when the commercial
 24 activity itself is illegal and the restriction on advertising is incidental to
 25 a valid limitation on economic activity.

26 *Id.* at 389.

27 ¹ It is notable that Plaintiff does not come to this Court with clean hands. Plaintiff has been deliberately and
 28 blatantly violating AB 1687, even though no injunction is in place enjoining enforcement of Civil Code § 1798.83.5.
 See Bryan Sullivan, *IMDb Refuses To Comply With California's Age Discrimination Laws*, Forbes (Jan. 11, 2017) (at
<http://www.forbes.com/sites/legalentertainment/2017/01/11/amazon-owned-imdb-in-age-discrimination-battle-with-state-of-california/#3c53353231e4>) (viewed Jan. 23, 2017); Plaintiff's Ciarella Decl., ¶¶ 12-13. Plaintiff's motion is
 also barred by laches. Plaintiff did not seek a TRO; instead, it waited several months after AB 1687 was signed into
 law by Governor Brown on September 24, 2016, to bring its preliminary injunction motion.

1
2 Thus, *Pittsburgh Press* stands for the proposition that not only may a
3 government bar discriminatory conduct, but may also prohibit certain expression in
4 order to make the anti-discrimination law effective – specifically, solicitations that
5 facilitate discriminatory conduct.²

6 *Pittsburgh Press* is not limited to explicitly segregated want ads in the
7 newspapers. Based on *Pittsburgh Press*, courts uphold anti-discrimination laws that
8 regulate a wide variety of expression that facilitates discriminatory conduct. Closely
9 analogous to the case at bar is *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th
10 Cir. 1974). In *Barrick Realty*, the city enacted an ordinance barring all “For Sale”
11 signs on residential property, in an attempt to prevent panic selling that could lead to
12 resegregation. Despite the fact that the ordinance barred truthful speech (after all,
13 such homes were for sale), the ordinance was upheld because it was directed toward
14 expression that facilitated discrimination:

15 The history of the ordinance banning ‘For Sale’ signs shows that
16 it was aimed at panic selling and that its purpose was to halt
17 resegregation. It was passed in response to the presence of numerous
18 ‘For Sale’ signs in some white neighborhoods, which caused whites to
19 move en masse and blacks to replace them. There is evidence in the
20 record that some real estate brokers who placed these signs (not
21 including any plaintiffs) actively encouraged resegregation by
22 unlawfully urging whites to sell quickly before they had black
23 neighbors and lower property values.

24
25 *Id.* at 163-64.

26 ² Amici First Amendment Scholars cite incitement cases such as *Brandenburg v. Ohio*, 395 U.S. 444 (1969),
27 to imply that there is a general rule that speech which facilitates illegal conduct may not be regulated by the
28 government. However, *Brandenburg* involves core political speech and is justified by the often tenuous asserted
connection between political speech and violent or illegal conduct. *Pittsburgh Press* deals with the very different
issue of discrimination, and permits the regulation of non-political expression that facilitates illegal discriminatory
conduct. *Brandenburg* clearly does not preclude regulation of speech that facilitates illegal conduct outside the
context of political expression. That brief’s conclusory assertion (p. 7) that “IMDb does not itself post, or aid in
posting, age discriminatory advertisements” is belied by the very nature of the site itself.

1 Thus, it does not matter that AB 1687 regulates truthful communications or
 2 that some disclosures of particular persons' ages will not result in discrimination.
 3 So long as the communication of the age of persons in the entertainment industry
 4 writ large facilitates illegal age discrimination, such expression may be regulated
 5 consistent with the First Amendment.³

6 In *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir. 1991), the Court held
 7 that the First Amendment permitted the government, through the Fair Housing Act,
 8 to bar housing advertisements featuring white models for homes in segregated white
 9 neighborhoods and black models for homes in black neighborhoods. "The
 10 complaint alleges that the ads in question discourage black people from pursuing
 11 housing opportunities by conveying a racial message in much the same way that the
 12 sex-designated columns in Pittsburgh Press furthered illegal employment
 13 discrimination. The Times's publication of real estate advertisements that indicate a
 14 racial preference is, therefore, not protected commercial speech." *Id.* at 1003.

15 More recently, the *Pittsburgh Press* rule has been applied to the online bed
 16 and breakfast service Airbnb.com. In *Airbnb Inc. v. City and County of San*
Francisco, 2016 WL 6599821 (N.D. Cal., Nov. 8, 2016), Judge Donato held that the
 17 City could constitutionally ban Airbnb from accepting any fee from an advertiser of
 18 an unregistered rental property, because such advertisements facilitate illegal
 19

20
 21 ³ *Amici* First Amendment Scholars argue that because it may be possible in some states to obtain birth dates
 22 through complicated and inconvenient procedures such as a search of public records, this means that any law that
 23 restricts the dissemination of birth dates on the Internet is unconstitutional. *Amici* cite no case with such a broad
 24 holding. The only "authority" for that broad statement was a treatise written by one of the scholars who joined the
 25 brief; the cases cited by *amici* all involve information that was well publicized, such as information contained in court
 26 records of publicized trials). Further, this "rule" would conflict with *Pittsburgh Press* and its progeny, which hold that
 27 speech which facilitates discrimination may be regulated. Making age information available to a determined person
 28 who goes to the proper government office and retrieves it from the archives is unlikely to facilitate age
 discrimination—making the same information available to anyone with a computer and an Internet connection will.

Similarly, *amici*'s argument that Google searches reveal birthdates of actors (including non-A list actors) does not show that AB 1687 will be ineffective, but rather only that Plaintiff has been effective at disseminating that information to the public. People who enter the entertainment industry after AB 1687 takes effect (especially off-screen talent, as well as less well known actors whose ages do not receive regular publicity) will be its beneficiaries, as their birthdates will not become public knowledge nor be accessible by Google-type searches in the first place.

1 rentals. *Id.* at *8. In doing so, the Court specifically rejected Airbnb's argument
 2 that *Pittsburgh Press* only applied if the advertisement on its face was unlawful. *Id.*

3 *Pittsburgh Press* has been applied in a wide array of circumstances. For
 4 instance, in *Goldin v. Public Utilities Commission*, 23 Cal.3d 638 (1979), the
 5 California Supreme Court upheld a rule requiring that telephone utilities deny
 6 service to persons who utilize the telephone for illegal purposes. *Goldin* involved an
 7 illegal escort service that utilized numerous telephone numbers to facilitate the
 8 business and to provide prostitutes for its clients. The Court recognized that
 9 commercial speech is ordinarily protected by the First Amendment, but stated that
 10 “when such communication proposes, discusses, or is intended to encourage or
 11 facilitate a commercial transaction [w]hich is itself illegal, the principle established
 12 in the *Pittsburgh Press* case is applicable.” *Id.* at 657.

13 A line of cases involving head shops, which sell drug paraphernalia (such as
 14 bong pipes), also confirms the applicability of the *Pittsburgh Press* principle. In
 15 *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982), the U.S. Supreme
 16 Court upheld the constitutionality of a statute that prohibited the sale of certain drug
 17 paraphernalia with or within close proximity to literature encouraging the use of
 18 illegal drugs. The Court accepted that the statute prohibited the communication of
 19 information promoting or encouraging drug use, but stated “if that activity is
 20 deemed ‘speech,’ then it is speech proposing an illegal transaction, which a
 21 government may regulate or ban entirely” under *Pittsburgh Press*. *Id.* at 496.

22 Pursuant to *Pittsburgh Press* and *Hoffman Estates*, a number of head shop
 23 laws that restrict various forms of expression have been upheld on the grounds that
 24 such expression facilitates illegal conduct. *Murphy v. Matheson*, 742 F.2d 564, 568
 25 (10th Cir. 1984) (advertisements of head shop “are not constitutionally protected in
 26 this instance because the statute is directed at commercial activity promoting or
 27 encouraging illegal drug use”); *Florida Businessmen for Free Enterprise v. City of*
Hollywood, 673 F.2d 1213, 1217 (11th Cir. 1982) (“[T]he government may regulate

1 or ban entirely commercial speech related to illegal activity”); *Town Tobacconist v.*
 2 *Kimmelman*, 453 A.2d 209, 216 (N.J. Super. 1982) (“The statute is thus directed
 3 only to advertisements which are known to have the purpose of aiding and
 4 promoting violations of the Controlled Dangerous Substances Act”); *Bamboo Bros.*
 5 *v. Carpenter*, 133 Cal.App.3d 116, 131 (1982) (“If the advertisement, as in the
 6 instant case, is encouraging an illegal activity, the principle established by
 7 *Pittsburgh Press* is applicable”).

8 Simply put, AB 1687 does nothing more than what numerous other such
 9 statutes have done in the past – *i.e.*, restrict communication that directly facilitates
 10 discrimination. Moreover, it does so in the context of an industry that has extensive
 11 age discrimination which has persisted despite enforcement efforts. Thus, if AB
 12 1687 restricts speech at all, it restricts is clearly unprotected by the First
 13 Amendment.

14 *Amici* Electronic Frontier Foundation *et al.* and *amici* First Amendment
 15 Scholars argue that enforcement of AB 1687 would stifle debate about age
 16 discrimination by depriving participants in that debate of information about
 17 performers’ ages. This is akin to arguing that *Pittsburgh Press* should have struck
 18 down the anti-discrimination regulation and permitted the discriminatory want ads
 19 so that the public would know the number of discriminatory want ads. It is perverse
 20 to permit discrimination simply to inform the public that such discrimination is
 21 taking place.

22 Similarly, *amici* First Amendment Scholars’ argument about the supposed
 23 value of knowing the age of people who work in the entertainment industry cannot
 24 be taken seriously.⁴ They characterize entertaining, satisfying curiosity, and
 25 educating as “valuable uses” of people’s (including non-celebrities’) private
 26

27 ⁴ Again, this argument cites no case authority and relies solely on a law review article written by one of the
 28 scholars who signed onto the brief.

1 information about their age. *Amici* thereby elevate the interest in Hollywood gossip
 2 above that of preventing age discrimination. This Court should not follow their
 3 lead.

4 Finally, *amici*'s "slippery slope"-type concern that the government could also
 5 regulate information related to other protected classes on commercial websites is
 6 misplaced. Gender, race, and national origin information is rarely kept private,
 7 whereas people go to great lengths not to disclose their ages. Even assuming a
 8 legislature passed such a statute, it would present far different issues than AB 1687.

9 **IV. AB 1687 IS NOT PREEMPTED BY 47 U.S.C. § 230.**

10 Section 230 of the Communications Decency Act immunizes interactive
 11 computer services from liability for the publication of information provided by
 12 another information content provider. 47 U.S.C. § 230(c)(1). Plaintiff may not
 13 claim this immunity with respect to the ages posted on its website because it curates,
 14 edits, and provides the information. Plaintiff has already admitted this in other
 15 litigation. See *Huong Hoang v. IMDb.com, Inc.*, 599 Fed.Appx. 674, 676 (9th Cir.
 16 2015) (in response to privacy claim by actress, IMDb admitted it used her
 17 subscription information to obtain and post her age, claiming this was expressly
 18 authorized by her subscriber agreement).

19 Because Plaintiff curates, edits, and provides age information for the website,
 20 it is itself an information content provider and cannot claim Section 230 immunity.
 21 Instead, Plaintiff's operations are analogous to those of Roommates.com and
 22 LinkedIn.com, both of which have been held to be information content providers
 23 ineligible for Section 230 immunity. *See, e.g., Fair Housing Council of San*
Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008);
Perkins v. LinkedIn Corp., 53 F.Supp.3d 1222, 1225-26 (N.D. Cal. 2014).

26

27

28

1 **V. CONCLUSION**

2 For the foregoing reasons, as well as those presented by the Attorney General
3 of the State of California, SAG-AFTRA and ATA jointly urge this Court to deny
4 Plaintiff's motion for a preliminary injunction in its entirety and uphold the
5 constitutionality of the important age discrimination protections found in AB 1687.

6

7 DATED: January 26, 2017.

Respectfully submitted,

8 HARDER MIRELL & ABRAMS LLP

9

10 By: 

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13 Guild-American Federation of Television
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